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No. 09-687

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNC LEAR SERVICES, INC.
AND LEAR SIEGLER SERVICES, INC.,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA AND
MINISTRY OF DEFENSE AND AVIATION
OF THE KINGDOM OF SAUDI ARABIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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SUMMARY OF ARGUMENT

The Kingdom's Opposition misconstrues the law, misstates the record, and merely highlights why LSI's Petition should be granted. **First**, LSI's Petition demonstrated that the Fifth Circuit's Opinion directly contravenes this Court's decisions in *Nelson* and *Weltover*. In response, the Kingdom claims that the Opinion faithfully applied *Weltover* but supports that claim with a quote in which the Fifth Circuit attempted to *distinguish Weltover* on the ground that it discussed a contract to buy army boots and bullets, while this case involves contracts to provide services that, according to the Fifth Circuit, were "vital" to an air defense and were performed by personnel "integrated" into the Saudi military.

This was not a faithful application of *Weltover*. The question is not whether LSI's personnel provided services "vital" to a sovereign purpose or whether they were integrated into the military; the "issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992). The answer, under *Weltover*, is self-evident: it is absolutely ordinary for private parties that own aircraft to contract for the maintenance of those aircraft. The Fifth Circuit reached the wrong conclusion because it asked the wrong question, in direct contravention of this Court's precedent.

Second, LSI's Petition demonstrated that this case raises exceptionally important issues because the Fifth Circuit's Opinion threatens to undermine a primary method under U.S. law for providing military goods and services to foreign governments – the direct commercial sales arrangement. Under that arrangement, a foreign government must enter into a Technical Assistance Agreement ("TAA"), as the Kingdom did here, promising not to transfer U.S. military data to third parties. If the Kingdom is immune from suit under the underlying direct commercial sales agreement, as the Fifth Circuit held, the Kingdom also would be immune from suit under the collateral TAA, thus placing U.S. military technology at risk.

The Kingdom responds by misrepresenting the record. It falsely asserts that LSI is not a party to the TAA and that the Kingdom's agreement not to transfer U.S. military data is with the U.S. government. To correct the record, LSI includes key portions of the TAA below, which confirm that the "parties" were LSI and the Royal Saudi Air Force and that they expressly agreed that the underlying contract was "commercial."

Third, LSI demonstrated that the Fifth Circuit contravened this Court's decisions restricting review under the collateral order doctrine to legal issues by relying on new facts not included in, and directly contrary to, the district court's findings. Again, the Kingdom's response highlights why LSI's Petition should be granted. The Kingdom asserts that the Fifth Circuit properly "disregard[ed]" its prelitigation

admissions that the TSP contract was "commercial" because these statements supposedly were taken out of context. But the district court expressly relied on these admissions as support for its finding that "the record, including the Kingdom's own admissions, establishes that the Kingdom's conduct in connection with the TSP and SPAGE contracts was commercial in nature and satisfies the first prong of the commercial activities exception." (App. 48.) By "disregarding" these admissions, with no analysis or acknowledgment of the district court's findings, the Fifth Circuit contravened this Court's decisions restricting review of collateral orders to legal issues.

LSI's Petition should be granted.

ARGUMENT

I. The Kingdom's Opposition Confirms That The Fifth Circuit Contravened This Court's FSIA Precedent.

LSI demonstrated that its Petition should be granted because the Fifth Circuit's Opinion contravenes this Court's directives in *Nelson* and *Weltover*. (Pet. 11-16.) *Nelson* instructs courts conducting an FSIA analysis to focus on the "particular conduct" by the defendant that forms the basis for the complaint. *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-57 (1993). *Weltover* instructs that the "issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of

actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614-15. When a foreign government "acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.*

The Fifth Circuit's Opinion contravenes both directives. Instead of focusing on the particular conduct *by the Kingdom* that forms the basis for LSI's claims (*i.e.*, contracting to purchase services and the subsequent refusal to pay), the Opinion focuses on the purpose of the work performed by LSI's employees and whether those employees were "integrated" with the Saudi military. (App. 12-13.) And rather than examining whether the Kingdom acted as a market participant, the Opinion examines whether LSI's employees can be "considered" military personnel. (*Id.*)

The Kingdom attempts to defend the Opinion, asserting it does not conflict with this Court's precedent because it quoted "the full statutory definition of 'commercial activity'" and discussed "at length" this Court's "helpful" explanation of the commercial activities exception in *Weltover*. (Opp. 9.) According to the Kingdom, even though the Fifth Circuit based its conclusion on its finding that the services LSI provided were "vital" to a "national air defense," the court actually was looking at nature and not purpose. (Opp. 9-10.)

The Kingdom's argument merely underscores the rift between the Opinion and this Court's precedent.

First, it confirms that the Fifth Circuit did not faithfully apply *Weltover*. The Kingdom asserts that the Opinion followed *Weltover* by stating that "[u]nlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide personnel that were vital to the operation of a national air defense." (Opp. 10.) But as this passage makes clear, the Fifth Circuit was not applying *Weltover*; it was attempting to *distinguish it* on the ground that this case involves a contract to provide "personnel" that supposedly were "integrated" with the RSAF, rather than "army boots or bullets."

But this proffered distinction is not valid under *Weltover*. Even accepting the Fifth Circuit's recharacterization of the TSP as a contract to provide "personnel," the question under *Weltover* is whether entering into and then breaching a contract for personnel are "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614. The answer is self-evident. And this is why there are countless decisions following *Weltover* and holding that contract disputes involving agreements to provide goods or services (even military goods and services) are "commercial" in nature. (Pet. 15-16.)

The Kingdom claims these decisions are inapposite because none involved a contract to employ "military personnel," which the Kingdom says is the "central factor" in the Fifth Circuit's analysis. (Opp. 11.) But this is an exercise in semantics and provides no justification for the Opinion's departure from

Weltover. A contract to provide personnel who provide services is a contract to provide services. The Kingdom could not provide these services itself, so it entered the marketplace, received bids from private American defense contractors, and ultimately entered into a direct commercial relationship with LSI. (App. 52-54, citing *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 548 (11th Cir. 1997).) LSI recruited technically-qualified personnel in the U.S., exported their expertise and services to Saudi Arabia, and managed every aspect of their work, including providing housing, transportation, and payroll. (App. 32-33, 55.) The Kingdom then refused to pay. Under *Weltover*, this is commercial activity; the fact that the services and personnel had a military *purpose* is irrelevant. 28 U.S.C. § 1603(d).

In addition to highlighting the departure from *Weltover*, the Kingdom's Opposition confirms that the Opinion contravenes *Nelson*'s directive to focus on the particular conduct of the defendant forming the basis for the complaint. *See Nelson,* 507 U.S. at 356. The Kingdom's brief does not even challenge LSI's showing that the Opinion contravenes *Nelson* – nor could it. The Fifth Circuit's analysis of the TSP is focused entirely on LSI's employees. (App. 12-13.) The analysis does not even mention, much less focus on, the Kingdom's conduct – namely, contracting with a private party and refusing to pay for the services provided.

If the Fifth Circuit had followed *Nelson* and *Weltover*, it could only have reached the conclusion

reached by the district court: "the Kingdom's commercial contracts and subsequent alleged breaches thereof exemplify contracts and conduct typically engaged in by private parties." (App. 54.)

II. The Kingdom's Opposition Misrepresents The Record And Confirms The Importance Of This Case.

LSI's Petition also demonstrated that this case involves issues of exceptional importance to the U.S. defense contracting industry. (Pet. 20-22.) By holding that the Kingdom is immune from this breach-of-contract suit, the Opinion threatens a primary method available under U.S. law to provide military services to foreign governments – namely, the direct commercial sales arrangement – because it leaves the contractor without a remedy when, as here, the foreign sovereign elects not to pay. The importance of this case is further highlighted by a TAA signed in connection with the TSP contract in which the Kingdom agreed to comply with U.S. arms control regulations. The Fifth Circuit's rationale would make the Kingdom immune from any effort to enforce the TAA, leaving U.S. military technology at the whim of a foreign government.

The Kingdom responds by misrepresenting the record, stating that "Lear is not even a party to the TAA, which was a separate agreement between the Kingdom and United States government." (Opp. 18.) This assertion is demonstrably false, as the TAA

expressly states that LSI is a "party" and the TSP is "commercial":

> TECHNICAL ASSISTANCE AGREEMENT . . . *by and between Lear Siegler Services, Inc. (hereinafter referred to as "LSI")* . . . and the Royal Saudi Air Force (hereinafter referred to as "RSAF") . . . (hereinafter referred to as the "Parties").
>
> . . . .
>
> Upon the terms and subject to the conditions contained in this TAA, the Parties agree that LSI will provide the RSAF with primary mission and logistics support for the RSAF F-5 weapon system under a follow-on three year *direct commercial contract* with the Ministry of Defense and Aviation (MODA). LSI will provide 628 technically qualified directed manning personnel to augment, assist, train and advise RSAF personnel in the operation, maintenance, and logistics support of the F-5 aircraft fleet.
>
> . . . .
>
> 5. The technical data or defense services exported from the United States in furtherance of this TAA and any defense articles which may be produced or manufactured from such technical data or defense service may not be transferred . . . [without State Department approval].

(LRE 35-36 (emphasis added).)

Besides misrepresenting the record, the Kingdom wrongly asserts that nothing in the Opinion allows it to violate U.S. law prohibiting the transfer of military technology. (Opp. 18.) But the TAA was entered into in connection with the TSP contract and is the sole document requiring the Kingdom, a foreign sovereign, to comply with U.S. arms control restrictions. (App. 32.) The TAA is an integral part of the direct commercial sales arrangement, and specifically prohibits the transfer of defense technical data, services or articles to third parties. (LRE 35-36.) If the Kingdom is immune from suit under the TSP contract, it would be immune from a suit by LSI seeking to enforce the TAA. The Kingdom identifies no other way to enforce its obligation not to transfer this information, and the Fifth Circuit's Opinion thus places U.S. military data and technology at risk.

Ignoring these risks, the Kingdom attempts to downplay this case's significance, arguing that the decision is "fact-bound" and pointing to the Fifth Circuit's conclusion regarding the SPAGE contract as proof. Again, the Kingdom's argument only highlights this case's importance. The only distinction made between the TSP and SPAGE contracts is that LSI's TSP employees supposedly were "integrated" with the Saudi military whereas the SPAGE employees were not. (App. 14.) The sole bases for this conclusion are provisions in the TSP contract stating that LSI's employees were to work "directly for and under the functional control of the RSAF." (Opp. 16.) If the Fifth Circuit's Opinion is allowed to stand, it would provide

the blueprint for foreign governments to circumvent the jurisdiction of U.S. courts in a case involving a direct commercial sales agreement: simply include a contractual provision stating the government will have functional control of the contractor's employees.

Finally, the Kingdom contends that the Fifth Circuit's Opinion leaves LSI with a remedy because "the SPAGE and TSP contracts contain forum selection clauses that specify resolution of any disputes in the Board of Grievances in Saudi Arabia." (Opp. 19.) Again, the Kingdom misstates the record. The Fifth Circuit explicitly held that, because of the Kingdom's own actions, "the Board never became available as a forum." (App. 21.) The court therefore rejected the Kingdom's argument: "if we accept the Kingdom's argument that the Board is the exclusive forum to resolve this dispute, Lear would be denied a remedy because the remedy the Kingdom points to in the SPAGE contract was never triggered." (*Id.*)

III. The Opposition Confirms That The Fifth Circuit Contravened Supreme Court Precedent Restricting Review Under The Collateral Order Doctrine To Legal Issues.

LSI demonstrated this Petition also should be granted because (i) the Fifth Circuit's decision directly contravenes this Court's precedent restricting review under the collateral order doctrine to legal issues; and (ii) there is a divergence in the standards of review courts are applying when reviewing interlocutory

immunity appeals under the FSIA (clear error) as compared to interlocutory appeals denying qualified immunity for domestic government officials (no review of factual questions). (Pet. 22-30.)

In response, the Kingdom does not dispute that review of collateral orders is restricted to legal issues. Nor does the Kingdom contest LSI's showing that there is a divergence in how courts are reviewing factual disputes on interlocutory appeals under the FSIA, with some courts, including the Fifth Circuit, holding that factual findings may be reviewed for clear error. (Pet. 26-27.) *This split is uncontested and alone warrants review by this Court.*

The Kingdom nonetheless attempts to defend the Fifth Circuit, asserting erroneously that the Opinion merely applied the "plain terms" of the TSP contract and that LSI failed "to identify any fact that the court of appeals found contrary to the district court." (Opp. 15-16.) Yet, the Kingdom also asserts that whether the Fifth Circuit correctly concluded that the TSP contract was governmental in nature is a "fact-bound" contention. (Opp. 7.) The Kingdom cannot have it both ways, arguing in one part of its brief that the issue is "fact-bound" and in another part that the Fifth Circuit merely addressed a legal issue.

In truth, the relevant facts were found by the district court after considering binders of exhibits, as well as declarations from LSI employees directly involved in administering the TSP contract. The district court found that "the record, including the Kingdom's

own admissions, establishes that the Kingdom's conduct in connection with the TSP and SPAGE contracts was commercial in nature and satisfies the first prong of the commercial activities exception." (App. 48.) The Kingdom ignores this finding, as well as the material differences between the new "facts" relied on by the Fifth Circuit and those found by the district court.

Indeed, the key "fact" relied on by the Fifth Circuit (that LSI's employees supposedly were integrated with the RSAF) is mentioned nowhere in the district court's opinion. To the contrary, the district court expressly rejected the Kingdom's assertion that LSI's employees were "so enmeshed in the daily activities and operations of national security that the underlying acts were sovereign." (App. 51.) The district court instead found that:

> Neither the TSP nor the SPAGE contracts were direct employment agreements. Unquestionably, it was LSI who recruited, trained, housed, and hired the individuals under the TSP contract. LSI, not the Kingdom, paid the individuals for their work under the TSP contract. The contracts are replete with references to LSI's obligation to hire quality employees and that the employees will be under the direct supervision of LSI.

(App. 55.) Under this Court's precedent, the Fifth Circuit had no authority to review these factual findings, much less come up with new ones. *See Coopers &*

Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (allowing collateral appeal to turn on facts "thrusts appellate courts indiscriminately into the trial process").

Contrary to the Kingdom's suggestion, granting this Petition will not require the Court to become "mired" in the facts. The Court need only compare the courts' decisions to readily recognize that the supposed facts relied on by the Fifth Circuit are different from – and in fact directly contrary to – those actually found by the district court.

Finally, and perhaps most tellingly, the Kingdom asserts that, even though the Fifth Circuit was limited to reviewing legal issues, it "did not err in *disregarding* the Kingdom's so-called 'admissions' that the TSP was a 'direct commercial contract.'" (Opp. 17 (emphasis added).) This assertion proves LSI's point. LSI submitted evidence to the district court that the Kingdom repeatedly stated that the TSP contract was "commercial," including the Kingdom's agreement in the TAA that the TSP was a "direct commercial contract." (Pet. 29; LRE 35-36.) The district court based its finding that the TSP was commercial, at least in part, on these admissions. (App. 48.) When it "disregard[ed]" this finding, the Fifth Circuit – in violation of Supreme Court precedent – undertook a plenary review of the facts. It is even more troubling that the Fifth Circuit undertook this review *sub silentio*, with no discussion of the proper standard under the collateral order doctrine.

CONCLUSION

LSI respectfully requests that the Court grant its Petition and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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